



BOARD OF APPEALS
Enid Starr, Co-Chair
Jesse Geller, Co-Chair
Robert De Vries

Town of Brookline

Massachusetts

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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 080040

Petitioners, Jacque Friedman and Evelyn Murphy, applied to the Zoning Board of Appeals for relief from the Building Commissioner's decision that parking along side the building at 142 Fuller Street is not a violation of the Zoning By-Law.

On 11 September 2008, the Board met and determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals and fixed 16 October 2008, at 7:15 p.m. on the 2nd floor of the Main Library as the time and place of a hearing on the appeal. Notice of the hearing was mailed to the Petitioner, to his attorney (if any) of record, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on 9 September and 2 October 2008 in the Brookline Tab, a newspaper published in Brookline. Copy of said notice is as follows:

NOTICE OF HEARING

Pursuant to M.G.L. C. 39, sections 23A & 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioner: **JACQUE FRIEDMAN & EVELYN MURPHY**
Location of Premises: **142 FULLER STREET**
Date of Hearing: **10/16/2008**

Time of Hearing: 7:15 p.m.

Place of Hearing: Main Library, 2nd. floor

A public hearing will be held for a variance and/or special permit from:

**the Zoning By-Law to Appeal the Building Commissioner's Decision, determining that
"parking along side the building of 142 Fuller St does not violate the zoning by-law at 142
FULLER ST BRKL**

Said Premise located in a **M-2.0** (Multi-Family) district.

Hearings, once opened, may be continued by the Chair to a date and time certain. No further notice will be mailed to abutters or advertised in the TAB. Questions regarding whether a hearing has been continued, or the date and time of any hearing may be directed to the Zoning Administrator at 617-734-2134 or check meeting calendar

at: <http://calendars.town.brookline.ma.us/MasterTownCalendar/?FormID=158>.

The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.

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At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman, Jesse Geller, and Board Members, Kathryn Ham and Jonathan Book. The petitioners were represented by Attorney James P. Duggan, 100 State Street, Boston, MA 02109.

Attorney Duggan stated that his clients were seeking to overturn a decision made 22 August 2008, by Michael Shepard, Building Commissioner rejecting the petitioner's requested enforcement of the Zoning By-Law. Mr. Duggan said that the Commissioner wrongly determined that "parking along side the building [142 Fuller Street] does not violate the Zoning By-Law." He said that, contrary to the determination of the current Building Commissioner, the then Acting Building Commissioner in a letter dated 24 April 2008 found that the subject parking did violate the Zoning By-Law. He described 142 Fuller Street as a four-unit apartment building. It is a separate property but is attached to other buildings

(130-140 Fuller Street). On the north side of 142 Fuller Street there is an approximate thirteen (13) foot strip of land where, at various times, as many as six (6) to eight (8) cars are parked in tandem. He said that in January 1971, the Town approved a plan permitting two (2) automobiles to be parked at the rear of 142 Fuller Street. On 28 December 1971 the Building Commissioner directed that "illegal parking" at the property cease immediately. On 31 December 1974 the Building Commissioner informed the property owner at 142 Fuller Street that the parking of four (4) cars in their side yard was a violation of the Zoning By-Law. More recent complaints regarding the parking of multiple automobiles at 142 Fuller Street have been received, and investigated by, the Building Commissioner, he said. Mr. Duggan acknowledged that historically vehicles parked on the 142 Fuller Street driveway permissively used the driveway on 148 Fuller Street, or portions thereof, for access and egress. Mr. Duggan said that this permission to use the driveway on 148 Fuller Street was revoked by his clients and that his clients recently received a building permit for the installation of bollards along the edge of their driveway between it and the 142 Fuller Street driveway. . He reported that the cars parking along side 142 Fuller have been trespassing over his client's driveway for access and egress to and from their spaces. He opined that the Building Commissioner's decision is not correct and he requested that the Zoning Board of Appeals overturn the Building Commissioner's decision.

Mr. Duggan, on behalf of the petitioners, stated that parking along the 142 Fuller Street driveway was, in effect, tandem parking and, therefore was in violation of the Town Zoning By-Law. Mr. Duggan further stated that vehicles exited the 142 Fuller Street driveway by trespassing over the driveway at 148 Fuller Street. Jonathan Book commented that §6.04 of the Zoning By-Law exempts certain size parking facilities from specific sections of the Zoning By-Law. Specifically, lots of six or fewer cars are exempt from the requirement that each motor vehicle may proceed to and from their parking space without requiring the moving of any other vehicle. Mr. Duggan acknowledged thereafter that, based on that By-

Law Section, the residents at 142 Fuller Street do not tandem park; but they do in fact trespass over his client's driveway to enter and exit their spaces. Mr. Book asked whether in Mr. Duggan's opinion, parking along side 142 Fuller Street was in and of itself in violation of the Zoning By-Law. Mr. Duggan replied no, that if they actually tandem park and did not cross over his client's property, there would be no violation. He said that they "can't tandem park and they don't." Mr. Duggan said that in addition to the trespass, the number of cars parked at 142 Fuller Street exceeded what was permitted and is safe. He said that there were often five cars parked and the last car often overhangs and, therefore, blocks the sidewalk. Mr. Duggan said at most only four cars could be accommodated along the 142 Fuller Street driveway. He said if the Zoning Board of Appeals did not overturn the Building Commissioner's decision regarding parking that they should limit the number of vehicles permitted to park along the 142 Fuller Street driveway.

Chairman Geller commented that the petitioners' request for relief and the Building Commissioner's denial was broadly stated and asked that the petitioners and the Building Commissioner specify the enforcement action requested of the Building Commissioner, the specific nature of the Building Commissioner's response and the relief sought by the petitioner. Michael Shepard, Building Commissioner, responded that parking lots of 6 or fewer cars are exempted by §6.04.11. He said that this section exempts the dimensional requirements of spaces, allows tandem parking, exempts the width of driveways and the location of parking relative to habitable rooms. Mr. Geller asked whether the enforcement action was specific to tandem parking and Mr. Shepard responded that it was.

Mr. Neal Glick of Donovan/Hatem LLP, representing the owner of 142 Fuller Street, said that he agreed that the provisions of Section 6.04. 3. of the Zoning By-Law (proscribing tandem parking) are not applicable to the parking on the 42 Fuller Street driveway pursuant to Section 6.04. 11. of the Zoning By-Law as noted in the Acting Commissioner's letter. He said that, in fact, his client was not in

violation of any section of the Zoning By-Law relative to parking on his property. Attorney Glick represented that this is not a case about tandem parking but rather about one neighbor using the Zoning By-Law to get back at another for alleged late payment for shared snow removal costs. He said that since no more than six cars have ever parked on the subject property, there is no provision in the Zoning By-Law that is being violated. Attorney Glick questioned the petitioners' standing to bring their appeal since they have suffered no harm. He said it is merely a case of spite, there is no violation and there is no standing on the part of the petitioners.

Mr. Duggan, in rebuttal, stated that if the owner of 142 Fuller cannot tandem park without trespassing onto the property of others then they cannot tandem park. He said they may have a "theoretical right" to tandem park, but not to trespass. He said that the owner of 142 Fuller Street was trying to gain an easement by prescription over the petitioners' property. He said no Court has determined that such a prescriptive right exists.

Evelyn Murphy, one of the petitioners, said that when six cars are parked on the 142 Fuller Street driveway, snow removal from her own driveway is difficult and passage along the sidewalk is impaired. She said that there was no spite intended in the erection of the bollards, that their installation is simply an effort to delineate the location of the property line for the benefit of all. She asked the Board to consider limiting the parking allowed on the 142 Fuller Street driveway.

Mr. Shepard stated that he has seen photographs of as many as six cars parked on the 142 Fuller Street driveway but has never seen evidence of more than six cars. He said that he suspected that those parking in this location do use the adjacent driveway to gain access to their spaces and also when leaving. He said that he advised Mr. Yee (the owner of 142 Fuller Street) that, while not zoning related, there is a section of the Town of Brookline General By-Laws that prohibits the blocking of the sidewalk. Mr. Shepard said that he tried to protect the rights of both parties. His interpretation preserved the right

of Mr. Yee to park in tandem and the issuance of the permit for the installation of flexible bollards allowed the owner's of 148 Fuller Street to delineate their property line. He said that there is only one curb cut accessing the two driveways; that the entire area is covered with asphalt and the only way to discern the property line is a small crack in the asphalt. Mr. Shepard said that he is convinced that so long as there are six or fewer cars, they could park on the 142 Fuller Street driveway but that this right gave them no right to trespass onto another's property. He said that in his opinion, the flexible bollards were a good solution which preserved the respective rights of the parties.

Associate Town Counsel, John Buchheit commented that he had worked closely with the Building Commissioner on this case. He said that the first letter issued by the Acting Building Commissioner regarding the parking may have been due to a misunderstanding, but he said that Mr. Shepard's interpretation, the decision in question, was, in his opinion, correct.

Ms. Jacque Friedman, one of the appellants, spoke of the history of the issue. That the Town has continually directed the owner of 142 Fuller not to park beside his building.

Jonathan Book said the parking use appears to be a pre-existing non-conforming issue. He said that given the history of the case it appears not to be a zoning issue but a property rights issue.

Kathryn Ham said that in her opinion there was no violation of the Zoning By-Law. She said that she understands the request to limit the parking to four cars but she believes the Board of Appeals does not have that authority in this case.

Jesse Geller said that since the initial enforcement letter was limited to the right of tandem parking on the 142 Fuller Street driveway and the Zoning By-Law permits tandem parking in the event six or fewer vehicles are parked on a lot, the By-Law clearly allows the parking on the 142 Fuller Street driveway. He said that there may be a number of issues appropriate for Land Court to decide, such as the questions

concerning trespass and prescriptive claims, but that they are not questions for the Zoning Board of Appeals determination.

Having considered all the testimony, and by a vote of 3-0, the Zoning Board of Appeals voted to sustain the decision of the Building Commissioner denying the petitioners' request that the Building Commissioner cause the cessation of parking along side the building at 142 Fuller Street.

Unanimous Decision of
The Board of Appeals


Jesse Geller, Chairman

Filing Date: December 15, 2008

A True Copy
ATTEST:



Patrick J. Ward
Clerk, Board of Appeals

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